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Supreme Court, U.S.
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No. 04-645

IN THE

Supreme Court of the United States

LEE BRENNEMAN,

Petitioner,

v.

MEDCENTRAL HEALTH SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Court of Appeals' determination that Petitioner failed to provide adequate notice of his alleged need for leave under the Family Medical Leave Act, based upon Petitioner's various assertions that the Court of Appeals misapplied the law.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

MedCentral Health System does not have a parent corporation and no publicly held company owns 10% or more of MedCentral Health System's stock.

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INTRODUCTION

Respondent MedCentral Health System ("MedCentral") respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. As discussed below, the Court of Appeals correctly applied well-established rules of law in determining that Petitioner failed to provide adequate notice of his alleged need for leave under the Family and Medical Leave Act ("FMLA").

STATEMENT OF THE CASE

MedCentral formerly employed Petitioner Lee Brenneman as a pharmacy technician. This case results from MedCentral's April 2000 termination of Brenneman's employment under MedCentral's no-fault attendance policy.

Brenneman compiled a significant history of absenteeism during his tenure at MedCentral. During the final five years of his employment alone, Brenneman was absent from work, late, or left early on 227 occasions. Brenneman failed to attribute any of his absences to his diabetic condition while he was employed at MedCentral.

Brenneman's final absence, which triggered his termination, occurred on March 31, 2000. That morning, Brenneman called in to work and stated that he "wasn't doing well and ... wouldn't be in today." Brenneman never communicated that his March 31st absence was allegedly related to his diabetic condition in the days thereafter, including three days that he worked. Brenneman also failed to mention his diabetes during his termination meeting on April 4, 2000. It was not until April 5, 2000, the day after his

termination and nearly a week after his final absence, that Brenneman's wife first claimed that Brenneman's diabetes had caused his March 31st absence.

Contrary to the assertion in Brenneman's Statement of the Case, during Brenneman's employment MedCentral provided him with no fewer than three separate, written notices discussing the FMLA and specifically providing that diabetes may be a covered condition under the FMLA. Also contrary to the assertion in his Statement of the Case, and as noted above, Brenneman failed to make any mention prior to his termination that his diabetic condition had allegedly caused his final absence.

REASONS FOR DENYING THE PETITION

The Sixth Circuit Court of Appeals' decision is consistent with the uniform holdings of other federal courts and the FMLA's regulations. Each of Brenneman's arguments to the contrary is addressed in turn below.

I. The Sixth Circuit Did Not Create a New Test or Otherwise Alter Previously Established Standards Regarding the Sufficiency of an Employee's Notice Under the FMLA.

Brenneman's argument that the Sixth Circuit's use of the phrase "substantively-sufficient notice" somehow changed the "test" for the sufficiency of notice under the FMLA is unsupported and incorrect. [Pet., at 7-11]. The Sixth Circuit and other federal courts previously have held that an employee has the initial obligation of providing an employer

with sufficient information to determine that the FMLA may be implicated with respect to a particular absence:

> [T]o invoke the protection of the FMLA, an employee must provide notice and a qualifying reason for requesting the leave. While the employee need not actually mention the FMLA by name, "[t]he critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition."

Brohm v. J.H. Properties, Inc., 149 F.3d 517, 523 (6th Cir. 1998) (quoting *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995)); *see also Seaman v. CSPH, Inc.*, 179 F.3d 297, 302 (5th Cir. 1999) ("In requesting leave, an employee need not invoke the specific language of the statute, but must apprize the employer of the request for time off for a serious health condition"); *Browning v. Liberty Mutual Ins. Co.*, 178 F.3d 1043, 1049 (8th Cir. 1999) ("Under the FMLA, an employer's duties are triggered when the employee provides sufficient information to put the employer on notice that the employee may be in need of FMLA leave"), *cert. denied*, 528 U.S. 1050 (1999); *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir. 1997) (an employee must provide his or her employer with sufficient information to make the employer aware that an absence results from a potentially FMLA-qualifying reason).

As recognized by these and other courts, an employee must necessarily provide his or her employer with *substantive* notice of the reason for an absence if the employer is to determine that the absence is FMLA-qualifying. In other words, the substance of an employee's notice must inform

the employer of the employee's serious health condition. Accordingly, the Sixth Circuit's mention of the need for "substantively-sufficient notice" is consistent with the notice requirements uniformly recognized by other federal courts.

The Sixth Circuit's use of the phrase "substantively-sufficient notice" also serves to distinguish the FMLA's requirement of adequate, substantive notice from the separate requirement that an employee provide timely notice of the need for leave. *See* 29 C.F.R. § 825.303(a) (in the event of unforeseeable leave an employee must "give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible"). That is, the Sixth Circuit's specific mention of "substantively-sufficient notice" also serves to differentiate these two separate requirements for "sufficient" notice under the FMLA – substantive notice and timely notice.

II. The Lower Courts Properly Determined the Sufficiency of Notice in this Case as a Matter of Law.

Also incorrect is Brenneman's argument that the lower courts improperly determined the sufficiency of his alleged notice of the need for FMLA leave as a matter of law. [Pet., at 11-14]. The Sixth Circuit previously has held that the sufficiency of an employee's notice of his or her need for FMLA leave may be determined as a matter of law. *See Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713, 723 (6th Cir. 2003) ("Although it is within the province of the jury to determine the facts of the notice given, it is for the court to determine whether those facts are sufficient reasonably to give an employer notice as required by the FMLA"). Consistent with this approach, several other courts have

found an employee's notice of the need for FMLA leave insufficient as a matter of law. *See, e.g., Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980-81 (5th Cir. 1998) (statements to employer that employee was "sick" and experiencing "a lot of pain in her side" constituted insufficient notice as a matter of law under the FMLA), *cert. denied*, 525 U.S. 826 (1998); *Gay v. Gilman Paper Co.*, 125 F.3d at 1435-37 (statement to employer that plaintiff was in the hospital having some tests constituted insufficient notice as a matter of law under the FMLA); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148-49 (8th Cir. 1997) (statement to employer that employee was "sick" and would be "out" from work constituted insufficient notice as a matter of law under the FMLA).

In this case, there existed no factual disputes with respect to the content of the notice given by Brenneman – Brenneman mentioned only that "he wasn't doing well and . . . wouldn't be in today." Brenneman provided no information even suggesting that his absence might be related to a serious health condition. Based upon these undisputed facts, the lower courts properly determined that Brenneman provided insufficient notice as a matter of law.

III. The Sixth Circuit's Holding is Consistent with the FMLA's Regulations.

Brenneman makes three separate arguments regarding the Sixth Circuit's application of the FMLA's regulations in the final portion of his Petition. These arguments are baseless.

First, Brenneman argues that MedCentral was required to provide him with a notice of FMLA rights and procedures every time that he was absent from work. [Pet., at p. 16-17].

The FMLA requires no such action, however. As discussed above, an employee has the initial obligation of providing an employer with reasonable notice that the employee is requesting time off for a serious health condition. *Seaman v. CSPH, Inc.*, 179 F.3d at 302; *Brohm v. J.H. Properties, Inc.*, 149 F.3d at 523; *Gay v. Gilman Paper Co.*, 125 F.3d at 1436. Without such notice from the employee, an employer has no way of knowing that an absence may be covered by the FMLA.

Logically then, the FMLA's regulations do not require an employer to provide written notice detailing the specific expectations and obligations of an employee taking FMLA leave *until* the employee first provides notice of the need for FMLA leave. *See* 29 C.F.R. § 825.301(c). In this case, Brenneman failed to provide notice of his alleged need for FMLA leave.

Second, Brenneman argues, based upon unspecified rules of statutory construction, that the Sixth Circuit interpreted too narrowly the FMLA regulation addressing the timeliness of an employee's notice of the need for unforeseeable FMLA leave. [Pet., at 20-23]. The applicable regulation provides, in pertinent part:

> When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of

> learning of the need for leave, except in extraordinary circumstances where such notice is not feasible.

29 C.F.R. § 825.303(a).

Contrary to Brenneman's arguments, the regulation does not allow for latitude in all cases in which an employee fails to provide timely notice of the need for FMLA leave. Rather, the regulation allows for latitude only in the event of "extraordinary circumstances where such notice is not feasible." *Id.* In this case, Brenneman provided no evidence of any circumstances that would have justified his subsequently working three days and waiting nearly a week before providing any information regarding the alleged reason for his absence.

Finally, Brenneman argues that other courts have denied summary judgment to employers on the issue of the sufficiency of an employee's substantive notice of the need for FMLA leave. [Pet., at 24-29]. Of course, this does not mean that Brenneman provided sufficient notice in this case. As discussed above, the content of Brenneman's alleged notice was undisputed. Brenneman simply provided no information that would have allowed MedCentral to determine that his absence was allegedly caused by a serious health condition.

CONCLUSION

For all the foregoing reasons, Respondent MedCentral Health System respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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